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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT GEORGE WILLIAMS,

Defendant and Appellant.

D069667

(Super. Ct. No. SWF1207153)

APPEAL from a judgment of the Superior Court of Riverside County, Angel M. Bermudez, Judge. Reversed.

Boyce & Shaefer and Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, A. Natasha Cortina, and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Albert George Williams of sexual penetration of a child under the age of 10, oral copulation of a child under the age of 10, nine counts of lewd and lascivious acts with a child under the age of 14, and witness intimidation. He appeals, contending: (1) the trial court abused its discretion in admitting evidence of other sex crimes because the two incidents were remote, and in one case he pleaded guilty to a non-sexual misdemeanor, and in the other case, a jury acquitted him of the charged offense of continuous sexual abuse of a child and deadlocked on lesser offenses; (2) the trial court erred by failing to admit evidence of the resolution of the two prior cases; (3) his counsel rendered ineffective assistance by failing to provide the court with certified copies of court records from one prior case and not introducing evidence that the other case resulted in a guilty plea to a non-sexual offense; (4) the prosecutor committed prejudicial misconduct; (5) the cumulative effect of the errors deprived him of due process; and (6) the trial court failed to exercise its discretion to choose between consecutive or concurrent sentences. We reverse the judgment.

Williams also filed a petition for writ of habeas corpus (*In re Albert George Williams* (D069669)), which was ordered considered with this appeal. We dismiss the petition as moot by separate order.

## FACTUAL AND PROCEDURAL BACKGROUND

*Alexis G.*

Williams was a martial arts instructor and taught classes in his garage. In September 2012, Alexis G., who was 10 years old, and her family moved into a house

across the street from Williams. Shortly thereafter, Alexis and her two brothers started taking Williams's martial arts classes.

During a lesson in November 2012, Williams told the children in the class to close their eyes as they were stretching. While the students' eyes were closed, Williams moved Alexis's shorts and underwear to the side and put his finger in her vagina. Later during the same class, Williams asked the class for a volunteer to set up the computer room to watch a video. After Alexis volunteered, Williams took her to his bedroom and instructed her to stretch, laying down on the bed with her legs open. Williams pulled Alexis's shorts and underwear to the side and then proceeded to lick her vagina. When Alexis told Williams to stop, he said he would only do it one time. Alexis closed her eyes when she heard Williams unzip his pants. Williams then told her to stop crying, zipped his pants back up, and told Alexis to run downstairs.

When the class resumed, Williams stared at Alexis as he told the class how he hated snitches. Williams went on to say that his son was in a gang and how a whole family could be killed if someone snitched. Alexis believed Williams was telling her that if she told anyone about what happened, bad things would happen. After the class, Alexis told her mother about the incident and Alexis's father called the police, which started an investigation.

*Chloe H.*

Chloe H.'s father lived down the street from Williams. Chloe and her brother took Williams's martial arts classes for two years. According to Chloe, Williams told students to close their eyes during the stretching portion of the classes. If they opened their eyes,

they would be punished with additional exercises. When parents were not watching the class, Williams would touch Chloe's vagina over her clothing during stretching exercises.

Based on Williams's comments about snitches getting hurt, Chloe believed she would get hurt if she told anyone about Williams's conduct. Chloe told her mother that she did not want to attend martial arts classes anymore.

In November 2012, Chloe's mother heard that Williams had been arrested. Chloe's mother went to Chloe's school to talk to her. At that point, Chloe told her mother that Williams had touched her inappropriately.

*Lilly H.*

Lilly H. took Williams's martial arts classes when she was 10 or 11 years old. On a number of occasions while Lilly was stretching in classes, Williams pushed her buttocks down with his hand and touched her vagina over her clothing. At some point, Lilly told Williams that his touching made her feel uncomfortable and she did not want him to touch her anymore.

Lilly saw Williams inappropriately touch Chloe. The two girls had a conversation about feeling uncomfortable when Williams touched them. Lilly was too embarrassed to tell her parents or a teacher about Williams's conduct.

*Prior Offense Evidence*

R.M., who was 44 years old at the time of the trial in this case, testified that she was five years old when she met Williams. R.M.'s mother dated and eventually married Williams. Starting when R.M. was five years old, Williams would try to penetrate her

with his penis and put his penis inside her mouth when they were alone together.

Williams also ejaculated on her and in her mouth.

R.M. and her mother moved to Texas when Williams and R.M.'s mother broke up. However, the abuse resumed when Williams and R.M.'s mother reconciled. Williams would sometimes take R.M. with him in the car to pick up her mother. On the way to pick up R.M.'s mother, Williams would stop in a secluded area and molest R.M. At some point, R.M. and her mother relocated to Los Angeles. Approximately one year later, R.M. saw Williams in her apartment when she returned from school. R.M. was 10 years old at the time. Williams commented about R.M. having breasts and tried to touch her breasts and vagina. R.M. cried, screamed and ran to a family member's nearby apartment. The family member called the police and R.M.'s mother. Williams was convicted of misdemeanor child endangerment for his conduct with R.M.

At the conclusion of R.M.'s testimony in this case, she spontaneously stated, "I just want to say what I want to say. You all keep letting him go. It's ridiculous." The court instructed the jury to disregard R.M.'s statement, not to be influenced by it in any way, and not to consider it for any purpose when making a decision in this case.

Kimberly P., who was 32 years old at the time of trial in this case, testified that she met Williams when she was approximately four years old. Kimberly's mother was friends with Williams's wife. Kimberly's mother occasionally left her in Williams's care. At first, Williams put his fingers in Kimberly's vagina and then he tried to put his penis in her vagina. Kimberly told her mother that she did not want to go to Williams's house anymore so she started going to her aunt's house instead and the abuse stopped.

When Kimberly was around seven years old, she started going to Williams's karate classes. Williams picked Kimberly up from school and took her to karate. The molestation resumed and worsened. It would occur in the car, in restrooms, at gas stations and at the karate school. Williams also took Kimberly to karate tournaments and, each time, he molested her by putting his fingers or attempting to put his penis inside of her.

When Kimberly was 10 years old, she stopped going to karate classes. Two years later, she told her mother about the abuse. Kimberly's mother called the police, which resulted in an investigation. Kimberly testified in a case against Williams when she was 12 or 13 years old. R.M. also testified at that trial.

### *Defense*

Kimberly Turner testified that Williams is her stepfather. Turner had lived with Williams since she was seven years old and had been alone with him on many occasions. Williams never touched her inappropriately. Turner's daughter had also lived in the same house as Williams and had been alone with him. Williams never touched Turner's daughter inappropriately or made inappropriate comments to her about sex or her appearance.

Williams's nephew, Cameron Kirkpatrick, testified that he took karate classes from Williams. Chloe and Lilly were in some of those classes. Kirkpatrick only closed his eyes about half of the time during stretching exercises and he never saw Williams touch Chloe or Lilly inappropriately. Kirkpatrick stated that Chloe would come out of class

and tell her brother that she and Lilly told Williams they did not like Williams touching them.

Jade Worthington took Williams's martial arts class for three or four months and stated Williams did not ask students to close their eyes during the stretching portion of the class. Chloe was in some of those classes. Worthington never saw Williams touch Chloe or any other student inappropriately.

Williams testified that he had taught a couple hundred female students over 30 years. Defense counsel asked him if he had ever been convicted of a crime. Williams responded that he was convicted of child cruelty for spanking R.M. Williams also explained that he talked to his students about snitches to warn them about gangs.

Williams also testified about the incident in November 2012, involving Alexis. He explained that he asked for a volunteer to help straighten out chairs in the computer room and Alexis volunteered. Another student taught the stretching portion of the class that day. According to Williams, he went to the computer room to check if he needed help with the chairs and told Alexis he would call her if he needed her. Williams did not need help so he told Alexis to get the other students so that they could all watch a video. Alexis only went upstairs when all of the other students went upstairs as well.

Williams denied touching Alexis and being in his bedroom with her. Williams also testified that he helped Chloe and Lilly stretch, but never touched them inappropriately.

## DISCUSSION

### I. *Request for Judicial Notice*

Williams requested that we take judicial notice of: (1) a felony complaint and information in Los Angeles County Superior Court Case No. YA018126, charging Williams with continuous sexual abuse of Kimberly in violation of Penal Code section 288.5; (2) a minute order indicating the jury found Williams not guilty of continuous sexual abuse of Kimberly and the lesser offense of encouraging and contributing to the delinquency of a child, and the jury hung nine to three on the lesser included offenses of lewd act with a child under the age of 14 and annoying or molesting a child under the age of 14; (3) a minute order dismissing the lesser included offenses in the case pertaining to Kimberly; and (4) a printout from the Riverside County Sheriff's Department indicating he was convicted of willful cruelty to a child and a charge of lewd or lascivious acts with a child was dismissed. The People initially opposed Williams's request for judicial notice, but withdrew the opposition in their brief.

Pursuant to Evidence Code section 459, subdivision (a) a "reviewing court may take judicial notice of any matter specified in [Evidence Code] Section 452." (Undesignated statutory references are to the Evidence Code.) Section 452 provides that a court may take judicial notice of the "[r]ecords of . . . any court of this state. . . ." (§ 452, subd. (d).) " 'Although a court may judicially notice a variety of matters [citation], only *relevant* material may be noticed. . . . Further, when a court takes judicial notice of official acts or public records, it does not also judicially notice ' "the truth of all



matters stated therein.' " (*Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569.)

We grant Williams's request for judicial notice of the three items from the case concerning Kimberly, including the felony complaint and information and two minute orders. (§ 452, subd. (d).) We deny Williams's request for judicial notice of information purportedly from the Riverside County Sheriff's Department. Williams identifies the document as a "Riverside County Sheriff printout of charges . . . filed and dismissed" against him in Los Angeles Superior Court Case No. A199794. There is no indication in the record that this document was presented to the trial court. (*People v. Hardy* (1992) 2 Cal.4th 86, 135 ["the general rule cautions against granting judicial notice on matters not presented to the trial court"].) Further, we are unable to ascertain the nature of the document or from where or how it was obtained. "The burden is on the party requesting judicial notice to supply the court with sufficient, reliable and trustworthy sources of information about the matter." (*People v. Maxwell* (1978) 78 Cal.App.3d 124, 130.) Accordingly, judicial notice of the document is not appropriate.

## II. *Prior Offense Evidence*

### A. Additional Background

Before trial, the prosecution moved in limine to introduce evidence under sections 1101 and 1108 that Williams had previously committed sex offenses against R.M. and Kimberly. The prosecutor informed the court that Williams was acquitted of the charges pertaining to Kimberly and received an insignificant sentence for charges pertaining to R.M. Williams argued the evidence should be excluded under section 352 because it was

more prejudicial than probative and in the case pertaining to Kimberly, he was acquitted on one count and the jury hung on another. The trial court found the evidence was admissible under section 1101 to prove intent and as propensity evidence under section 1108.

#### B. Admission of Prior Offense Evidence

Williams argues the trial court abused its discretion in admitting evidence of the prior alleged sex offenses against R.M. and Kimberly under sections 1101, subdivision (b), and 1108 because the court failed to meaningfully consider the remoteness of the incidents and the outcomes of the prior prosecutions. We reject these arguments because the prior offense evidence was admissible under section 1108.

Generally, evidence of a defendant's character is not admissible to prove his conduct on a specific occasion conformed to his character. (§ 1101, subd. (a).) An exception to this rule provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a).) Because evidence a defendant committed prior sex offenses is " 'particularly probative' " in a sex offense case (*People v. Story* (2009) 45 Cal.4th 1282, 1293), such propensity evidence is presumptively admissible unless, under section 352, its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues or misleading the jury. (*People v. Loy* (2011) 52 Cal.4th 46, 62.) " 'This determination is entrusted to the sound

discretion of the trial judge who is in the best position to evaluate the evidence.' "

(*People v. Harris* (1998) 60 Cal.App.4th 727, 730.)

In engaging in the balancing of probative value and prejudice, the court must consider such factors as the nature and relevance of the evidence, the remoteness of the prior offense and the degree of certainty of its commission, the likelihood that the introduction of the evidence will confuse, mislead or distract the jurors from their main inquiry, the similarity of the prior offense and the charged offense, the likely prejudicial impact on the jurors, the burden on the defendant in defending against the prior offense and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the prior offenses or excluding irrelevant though inflammatory details surrounding the prior offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 (*Falsetta*).)

Williams contends the trial court erred in admitting evidence of the prior offenses because it failed to consider that the prior acts against R.M. occurred in the 1970s and the acts against Kimberly occurred in the early 1990s. Williams faults the trial court for focusing its analysis on relevancy and the similarity of the prior and the current offenses without mentioning remoteness. As Williams points out, the trial court engaged in a lengthy discussion with counsel regarding the similarity of the prior and charged offenses. The trial court noted that the offenses involving Kimberly and R.M. were similar to the current crimes in that they included a relationship of trust and sexual offenses involving vaginal contact against young girls. The degree of similarity of the crimes is relevant to an evaluation under both sections 1101 and 1108. (*People v. Lewis*

(2009) 46 Cal.4th 1255, 1285 (*Lewis*).) Moreover, the trial court considered similarity in analyzing and weighing the prejudicial impact of the prior offense evidence against its probative value under section 352. Accordingly, the trial court properly considered the similarity of the crimes.

The fact that the trial court engaged in a discussion with counsel regarding the similarity of the crimes does not mean that it excluded or failed to evaluate other factors. To the contrary, the record reveals that the trial court was well aware of the remoteness of the prior offenses because both the prosecutor and defense counsel informed the trial court that the prior conduct took place decades earlier. While the trial court focused its analysis on the similarity of the past and current offenses, a trial court "is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The trial court is not required to expressly mention each factor it considered if, as here, the record as a whole shows that the court engaged in the proper balancing. (*Lewis, supra*, 46 Cal.4th at p. 1285.) Moreover, where the propensity evidence is probative of Williams's sexual misconduct and is the type of evidence contemplated by section 1108, "the passage of a substantial length of time does not automatically render the prior incidents prejudicial." (*People v. Soto* (1998) 64 Cal.App.4th 966, 991-992 (*Soto*).)

Williams also argues the trial court abused its discretion in admitting the prior offense evidence without considering the outcomes of the prior prosecutions. To support his argument, Williams primarily relies on *People v. Griffin* (1967) 66 Cal.2d 459 (*Griffin*) and *People v. Mullens* (2004) 119 Cal.App.4th 648 (*Mullens*). However, those

cases do not prohibit the admission of prior offense evidence if the defendant was acquitted. (*Griffin*, at pp. 465-466; *Mullens*, at p. 665.) Rather, *Griffin* and *Mullens* stand for the proposition that when the trial court admits prior offense evidence, it should also admit acquittal evidence. (*Griffin*, at pp. 465-466; *Mullens*, at pp. 665 & 669, fn. 9.) We see nothing in the record suggesting that the trial court did not consider the outcomes of the prior cases in finding the evidence admissible under section 1108. However, as we explain later, the trial court committed prejudicial error by not giving Williams an opportunity to rebut the section 1108 propensity evidence with evidence that he was not convicted of the prior sex offenses (*post*, pt. III).

For the reasons set forth above, we conclude that the trial court did not abuse its discretion in admitting the prior offense evidence under sections 1108 and 352 and thus we need not reach the issue of whether the evidence was also properly admissible under section 1101, subdivision (b). (*Soto, supra*, 64 Cal.App.4th at p. 992.)

### C. Due Process Challenge

Williams argues that admission of the section 1108 propensity evidence violated his due process and fair trial rights. He acknowledges that the California Supreme Court decided that issue adversely to his position in *Falsetta, supra*, 21 Cal.4th at p. 913, but contends the United States Supreme Court has not decided the issue. We are bound by our high court's decision in *Falsetta*. (*Auto Equity Sales Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Embedded within his due process argument, Williams contends he was prejudiced by the court instructing the jury with CALCRIM Nos. 375 and 1191, which included an

introductory paragraph providing: "The People presented evidence that the defendant committed the crimes of Lewd and Lascivious Acts Upon a Child under 14 years in violation of Penal Code section 288(a) [and other offenses] that were not charged in this case." Williams contends this portion of the instructions resulted in the court telling the jury he had committed the other crimes. We reject this argument because the instructions went on to caution the jury that it "may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses." Reading the instructions as a whole, a reasonable jury would not read them as conclusively stating Williams had committed the uncharged offenses. (*People v. Smithey* (1999) 20 Cal.4th 936, 963 [In evaluating a claim that an instruction is misleading, we consider the instructions as a whole, not just in isolated parts].) Accordingly, the court's instruction to the jury with CALCRIM Nos. 375 and 1191 does not support Williams's due process challenge.

### III. *Exclusion of Disposition Evidence*

#### A. Additional Background

At the conclusion of the People's case, defense counsel asked the trial court to take judicial notice of documents from the Los Angeles County Superior Court showing that in the prior case concerning Kimberly, the jury acquitted Williams of the charged offense of continuous sexual abuse and a lesser included offense of encouraging or contributing to the delinquency of a child. The documents also showed the jury hung nine to three in favor of acquittal on lesser included offenses of lewd act with a child under the age of 14 and annoying or molesting a child under the age of 14, and the court subsequently

dismissed the action in the interest of justice. The prosecutor objected. The court denied judicial notice, finding the documents were not relevant and defense counsel failed to provide certified copies.

## B. Analysis

Williams contends the trial court erred by denying his request for judicial notice of court documents from the case involving Kimberly. We agree.

"[I]f a trial court permits the prosecution to present evidence that the defendant committed one or more similar offenses for which he or she is not charged in the current prosecution, the trial court must also allow the defense to present evidence of the defendant's acquittal, if any, of such crimes, and failure to allow such acquittal evidence constitutes error." (*Mullens, supra*, 119 Cal.App.4th at pp. 664-665 [discussing the "*Griffin* rule" derived from *Griffin, supra*, 66 Cal.2d 459].) This rule "applies to cases in which propensity evidence is admitted under section 1108 and, if the defendant in such a case has been acquitted of a prior sex offense to which the section 1108 propensity evidence pertains, the trial court in such a case is *required* to admit evidence of the defendant's acquittal." (*Mullens*, at p. 669, italics added.) "The rationale underlying the [*Griffin* rule] is that evidence of an acquittal assists the jury in its assessment of the significance of the evidence of the other crime 'with the knowledge that at another time and place a duly constituted tribunal charged with the very issue of determining defendant's guilt or innocence of the other crime concluded that he was not guilty.' " (*People v. Jenkins* (1970) 3 Cal.App.3d 529, 534 (*Jenkins*).) "The admission of acquittal evidence under the *Griffin* rule to rebut the propensity evidence assures fundamental

fairness and protects the defendant's due process right to a fair trial and the right to present a defense." (*Mullens*, at p. 669, fn. 9.)

Here, documents from the prior case concerning Kimberly showed that a jury found Williams not guilty of continuous sexual abuse and the lesser included offense of encouraging and contributing to the delinquency of a child. The documents also showed that the jury hung nine to three in favor of acquittal on the lesser included offenses of lewd act with a child under the age of 14 and annoying or molesting a child under the age of 14. The trial court subsequently dismissed the case in the interest of justice under Penal Code section 1385.

The People argue the *Griffin* rule does not apply because while a jury acquitted Williams of the greater offense, it hung on two lesser included offenses. Thus, the People argue, "it was not an acquittal that would have blunted the effect on the jury." We are not persuaded by this argument because the rationale of *Griffin* to assist the jury in its assessment of the significance of the evidence of the other crime applies equally in this case. The *Griffin* rule applies even where the charges of the other crime have been dismissed or have not been prosecuted because such evidence tends to weaken or rebut the prosecution's evidence of the other crime. (*Jenkins, supra*, 3 Cal.App.3d at p. 534.) Likewise, even though the jury in the case concerning Kimberly hung on two lesser included offenses, evidence that it acquitted Williams of continuous sexual abuse and contributing to the delinquency of a child cast doubt on the prosecution's evidence of the crimes involving Kimberly. We find no reason in law or logic to limit *Griffin* as suggested by the People.



In light of the foregoing, we conclude that the trial court erred by failing to take judicial notice of the disposition of the case concerning Kimberly based on lack of relevancy. We also reject the trial court's refusal to take judicial notice of the documents because they were not certified. The *Griffin* rule does not necessarily require a certified copy. Instead, "a *properly authenticated acquittal* is admissible to rebut prosecution evidence of guilt of another crime." (*Griffin, supra*, 66 Cal.2d 459, 466, italics added.) The trial court did not provide Williams with an opportunity to authenticate the documents or make a showing of trustworthiness through competent evidence. Moreover, the prosecutor did not dispute the authenticity or trustworthiness. Although the documents are not certified, they appear on their face to be court records. They include a caption from the Los Angeles County Superior Court, case information, identify the judge, court reporter, clerk and parties, and are stamped "entered" by the county clerk. We find it noteworthy that at every turn, the trial court prevented Williams from introducing evidence regarding the disposition of the case pertaining to Kimberly. For example, on numerous occasions when Williams attempted to testify that a jury found him not guilty in the case, the trial court sustained the prosecutor's objections and struck Williams's testimony on the subject. Under these circumstances, the trial court erred in declining to judicially notice or provide Williams an opportunity to properly authenticate court documents from the prior case.

Williams also contends the trial court should have admitted evidence of his misdemeanor plea in the case involving R.M. The People contend Williams forfeited this argument by failing to request admission of evidence of the guilty plea in the trial court.

We reject the People's forfeiture argument because even if Williams had requested that the trial court admit evidence of his guilty plea, the request would have been futile. Based on the record before us, we are convinced that any further attempts by defense counsel to introduce evidence of the outcomes of the prior cases against Williams would have been outright rejected by the trial court. (See *People v. Jaspal* (1991) 234 Cal.App.3d 1446, 1455 [based on "th[e] record and the apparent mindset of the trial judge," an objection to prosecutor's improper comments would have been futile].)

As with the evidence showing Williams was acquitted in the prior case pertaining to Kimberly, evidence of the outcome of R.M.'s case was relevant to assist the jury in assessing the significance of the evidence the prosecution presented regarding Williams's past conduct against R.M. The trial court's failure to allow Williams to introduce evidence of the outcomes in the prior cases unfairly tipped the balance of the prior offense evidence in favor of the prosecution, rather than allowing the jury to properly consider the weight and significance of the evidence knowing all pertinent information. The trial court violated its fundamental " 'duty to see that both sides receive a fair trial and that justice is done.' " (*People v. Williams* (2009) 170 Cal.App.4th 587, 615.)

#### C. The Error Was Prejudicial

Williams contends he was prejudiced because the trial court's failure to admit the disposition evidence, combined with the prosecutor's argument to the jury that Williams had engaged in "40 years" of terror and R.M.'s statement that "you all keep letting him go," misled the jury to believe he had an unfavorable result in the prior case. We agree

that the trial court's error in not admitting evidence of the dispositions in the prior cases was prejudicial.

Error in excluding acquittal evidence is reviewed under the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Mullens, supra*, 119 Cal.App.4th at pp. 652, 669.) Under that test "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, at p. 836.)

Here, Kimberly's and R.M.'s testimony was a significant portion of the evidence against Williams. The trial court's error in failing to admit evidence of the outcomes of their prior cases impacted the jury's consideration of the evidence. Had the jury been allowed to consider that Williams was acquitted in one case and pleaded to a non-sexual offense in the other, it may have impacted the weight and significance it gave to Kimberly's and R.M.'s testimony. Thus, the jury's consideration of the evidence would have been materially affected.

Moreover, the prosecutor compounded the trial court's error by telling the jury, "Kimberly finally got the courage to tell her mother what had happened. An investigation ensued, a trial was had, and *the jury was unable to come to a verdict.*" (Italics added.) The prosecutor went on to tell the jury that R.M. would testify that she previously testified in Kimberly's trial "where a verdict was unable to be reached by the jury." In our view, the prosecutor took advantage of the trial court's *Griffin* error and gave the jury a false impression of the prior offense evidence. The trial court and

prosecutor together hampered the jury's ability to fairly and fully evaluate the evidence and denied Williams an opportunity to present a full defense.

We conclude it is reasonably probable that had the jury been informed of the dispositions of the prior cases, a result more favorable to Williams would have been reached. The trial court's error combined with the prosecutor's statements, resulted in a miscarriage of justice in this case requiring reversal of the judgment.

#### IV. *Alleged Ineffective Assistance*

Williams contends his counsel was ineffective because he did not alert the trial court to *Mullens*, *Griffin* and related cases regarding acquittal evidence, failed to provide the court with certified copies of documents from the case concerning Kimberly, and did not attempt to introduce evidence regarding the disposition of the case arising from conduct related to R.M. We reject these arguments.

"To prevail on a claim of ineffective assistance of counsel, defendant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice." ' " (*People v. Leonard* (2014) 228 Cal.App.4th 465, 484, quoting *People v. Hart* (1999) 20 Cal.4th 546, 623.) " [T]he record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " (*People v. Hart*, at p. 624.)

Based on our decision reversing the judgment, we need not consider Williams's ineffective assistance claims. However, we note that while defense counsel did not argue

that the trial court was *required* under *Griffin, supra*, 66 Cal.2d 459, and its progeny to admit acquittal evidence to rebut the prosecution's prior offense evidence, he did attempt to admit the evidence. Through no fault of defense counsel, the trial court rejected his request to introduce the disposition evidence. Based on our review of the record, the trial court was determined to exclude the evidence. (See *ante*, pt. III.C.) Thus, even if defense counsel had further advocated for admission of the evidence by alerting the court to relevant case law, providing certified copies of documents, or offering other evidence, we are convinced the trial court would have rejected defense counsel's efforts. We, therefore, conclude defense counsel did not render ineffective assistance.

## V. *Alleged Prosecutorial Misconduct*

### A. General Legal Principles

Under California law, a prosecutor who uses deceptive or reprehensible methods to persuade a jury has committed misconduct, even if such action does not render the trial fundamentally unfair. (*People v. Frye* (1998) 18 Cal.4th 894, 969.) "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*Id.* at p. 970.) We do not look to isolated words or phrases, "we must view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

"To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 447.) Therefore, to avoid forfeiture or waiver of prosecutorial misconduct, a defendant generally "must make a timely objection, make known the basis of his [or her] objection, and ask the trial court to admonish the jury. [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553.) However, "[a] defendant will be excused from the requirement of making a timely objection and/or a request for an admonition if either would have been futile. [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.)

#### B. Analysis

Williams argues the prosecutor committed misconduct by falsely arguing the facts, urging the jury to end his "40 years" of terror, expressing her personal opinion on his guilt, misstating the law, and telling the jury to convict him because he lied whereas the prosecution witnesses told the truth. He further argues that he did not forfeit his claims of prosecutorial misconduct by failing to object below and, alternatively, his counsel rendered ineffective assistance by failing to object.

Williams did not object to the alleged incidents of prosecutorial misconduct in the trial court. In our view, in many instances, objections would have been futile because the trial court had prevented the defense from presenting evidence of the outcomes of the cases concerning Kimberly and R.M. However, even if Williams forfeited his prosecutorial misconduct claims, we exercise our discretion to consider the arguments on

the merits to the extent they relate to or compounded the court's *Griffin* error. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7 ["an appellate court may review a forfeited claim—and '[w]hether or not it should do so is entrusted to its discretion.' "].) Based on our reversal of the judgment, we need not consider Williams's remaining claims of prosecutorial misconduct and ineffective assistance.

### 1. *Alleged Misstatement of Facts*

In opening statement, the prosecutor stated, "Kimberly finally got the courage to tell her mother what happened. An investigation ensued, a trial was had, and *the jury was unable to come to a verdict.*" (Italics added.) The prosecutor went on to tell the jury that R.M. would testify that she previously testified in Kimberly's trial "where a verdict was unable to be reached by the jury." Williams contends the prosecutor misstated the facts by telling the jury that a former jury could not reach a verdict concerning the charges involving Kimberly. Williams argues the prosecutor knew this was a false statement because he was acquitted in that case.

We agree that the prosecutor misled the jury because in the case pertaining to Kimberly, a jury had acquitted Williams of the charged offense and a lesser included offense and was unable to reach a verdict on two lesser included offenses. The prosecutor was well aware of the disposition in the prior case. While it is true that the jury in the prior case was unable to reach a verdict on *some* charges, "[i]t is the duty of counsel to state the facts fairly." (*People v. Nelson* (1964) 224 Cal.App.2d 238, 252.) In this case, that duty included telling the jury of the full disposition in the prior case rather than employing misleading phrasing. The prosecutor violated her fundamental duty and,

combined with the trial court's errors, created a "negative synergistic effect" that rendered the trial unfair to Williams. (*People v. Hill* (1998) 17 Cal.4th 800, 847.)

## 2. *Alleged Inflammatory Statements*

Williams argues the prosecutor committed misconduct by arguing in closing: "The time for this to stop is now. And this is the place that it must stop. I'm confident that each and every one of you will do your duty and come back with the only just verdict in this case and *end 40 years of terror*." Williams contends the prosecutor's argument urged the jury to convict Williams for reasons unrelated to his guilt, namely the uncharged offenses. Under the circumstances of the proceedings in this case, the prosecutor's comment was improper.

In general, a prosecutor may "comment on the serious and increasing menace of criminal conduct and the necessity of a strong sense of duty on the part of jurors." (*People v. Escarcega* (1969) 273 Cal.App.2d 853, 862-863.) A prosecutor is given wide latitude in closing argument and may make a vigorous argument so long as it amounts to a fair comment on the evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) In the instant case, however, the prosecutor's reference to Williams's "40 years of terror" amplified the trial court's *Griffin* error. The prosecutor's statement was one of many pieces in this trial that gave the jury a false impression of the prior offense evidence.



Reversal is warranted in this case as a result of the prosecutor's misconduct combined with the trial court's error in excluding prior offense disposition evidence.

#### VI. *Alleged Cumulative Error*

Williams contends the accumulation of errors in his case warrants reversal of his convictions. A series of errors, though harmless when considered independently, may in some circumstance rise to the level of prejudicial reversible error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Having found individual errors require reversal, we also conclude their cumulative impact warrants reversal.

#### VII. *Alleged Sentencing Error*

Williams argues the trial court did not exercise its discretion to choose between consecutive and concurrent sentences, mistakenly believed it was required to impose consecutive life sentences on counts 5 through 12 pertaining to Chloe and Lilly, and failed to give a reason for imposing consecutive sentences on counts 1 and 2 pertaining to Alexis. The People assert Williams forfeited his claim by not objecting below, but even if he did not forfeit the claim, the record fails to show error. Williams's claim of sentencing error is moot in light of our conclusion that his convictions must be reversed. (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1301, 1309.)

DISPOSITION

The judgment is reversed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.